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IN THE SUPREME COURT OF THE UNITED STATES

No. 04-8990

PAUL GREGORY HOUSE, *Petitioner,*

v.

RICKY BELL, *Respondent.*

INTEREST OF AMICI CURIAE

Amici curiae are responsible for enforcing their criminal laws and defending state court judgments. The amici states have an interest in the "sensitive, and, to say the least, troubling" issue of litigating claims of "actual innocence" in federal court. *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J. conc.). The states provide judicial and executive avenues to address innocence claims. They also have an interest in the integrity of their procedural rules. Few rulings would be more disruptive of our federalist system than to provide for federal habeas review of freestanding claims of actual innocence. *Id.* at 401 (Rehnquist, C.J.).

In light of the amici states' interest in the finality of their judgments and the comity between state and federal court systems, it is important for this Court to consider accurate information relevant to maintaining "society's high degree of confidence in its criminal trials. . . ." *Id.* at 420 (O'Connor, J. conc.). Accordingly, the states have a stake in correcting misconceptions about claims of death row exonerations. Amaici curiae submit this brief in support of the respondent in this case under this Court's Rule 37.4.

SUMMARY OF ARGUMENT

The "prototypical example of 'actual innocence' is . . . where the State has convicted the wrong person of the crime." *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992). Contrary to the arguments of petitioner and his amici, available evidence of instances of "actual innocence" in capital cases does not justify disrupting the "paramount" role of state criminal proceedings "for determining the guilt or innocence of the defendant" or expanding the traditional limits on "[f]ederal habeas review . . . to claims of constitutional violations occurring in the course of the underlying state criminal proceedings." *Herrera*, 506 U.S. at 416, 419. There is nothing new about claims that the criminal justice system is fallible.

Moreover, the "evidence" of exonerations of so-called "actually innocent" defendants sentenced to death is based on overly inclusive criteria, questionable methodology and irrelevant information. In particular, many of the examples cited in the studies relied upon by petitioner and his amici do not show that the "wrong person" was convicted and sentenced to death.

The list of allegedly innocent defendants maintained by the Death Penalty Information Center includes defendants who were acquitted or had their cases dismissed because the prosecution could not carry its burden of proving guilt beyond a reasonable doubt. Of course, that failure of proof does not mean that the prosecution charged the "wrong person." On some occasions, jurors in these cases have indicated that their verdicts were based on the burden of proof, not because they believed that the defendant was "actually innocent." In other cases there were actual findings that "actual innocence" was not proven. Other defendants were acquitted, but they were still physically involved in the murders charged or were the actual perpetrators. Allegedly exonerated defendants were acquitted because evidence of their guilt was excluded. In other cases, prosecution witnesses recanted testimony under questionable circumstances. When co-defendants are separately tried, evidence emerges that

indicates that an acquitted co-defendant was not "actually innocent."

Furthermore, many of these examples demonstrate the efficacy of our Constitution's currently existing "unparalleled protections against convicting the innocent." *Id.* at 420 (O'Connor, J. conc.). For instance, many defendants had their convictions reversed on direct review. Their subsequent acquittals or case dismissals demonstrate that the conventional review system has worked. These cases do not establish a necessity for increased intrusive federal review of state judgments. Other older cases of allegedly exonerated death row inmates are irrelevant because they were sentenced under unconstitutional statutes that lacked the procedural protections of today's death penalty statutes.

A criminal justice system based on "reasonable doubt" carries the inherent risk of mistake. Yet even under the most liberal estimate, the number of "actually innocent" defendants sentenced to death since the advent of modern death penalty jurisprudence in 1973 is slight - amounting to 1.6 percent of 7,529 death sentences. More likely, the true number is only half of one percent. An overwhelming number of these cases were resolved by state courts.

ARGUMENT

EVIDENCE OF ALLEGED DEATH ROW EXONERATIONS DOES NOT SUPPORT CREATING A FREESTANDING CLAIM OF "ACTUAL INNOCENCE" COGNIZABLE UNDER 28 U.S.C. § 2254 OR RELAXING THE "MISCARRIAGE OF JUSTICE" EXCEPTION TO THE PROCEDURAL DEFAULT RULE

Recently, the Second Circuit Court of Appeals placed the debate in context: "[T]he argument that innocent people may be executed - in small or large numbers - is not new; it has been central to the centuries-old debate over both the wisdom and the constitutionality of capital punishment. . . ." *United States v.*

Quinones, 313 F.3d 49, 63 (2d Cir. 2002) [hereafter *Quinones II*] *rev'g United States v. Quinones*, 205 F.Supp.2d 256 (S.D.N.Y. 2002) [herafter *Quinones I*] *cert. den. Quninones v. United States*, 540 U.S. 1051 (2003).

In this Court, the risk of executing actually innocent people played a role in its decision invalidating most extant death penalty statutes in *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J.), and in the Court's holdings that an "actual innocence" claim can excuse procedural defaults in habeas corpus cases. *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Murray v. Carrier*, 477 U.S. 478 (1986).

The public has clearly expressed its view on the wisdom of capital punishment. Public sentiment has long supported—and continues to support—the death penalty even though the populace is aware that the criminal justice system is not foolproof.[1] In the few years between *Furman* and *Gregg v. Georgia*, 428 U.S. 153 (1976), thirty-five states enacted new death penalty statutes. *See Gregg*, at 179-80 (Opinion of Stewart, Powell, and Stevens, JJ.). Today, thirty-eight states and the federal government impose the death penalty for one or more especially heinous types of crime.

The constitutionality of the death penalty has not seriously been questioned by this Court for almost 30 years, and in 1993 this Court declined to hold that federal courts could entertain freestanding claims of actual innocence. *Herrera v. Collins*,

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1. Furthermore, the public has long understood that there is always an inherent risk that an innocent person could be convicted and sentenced to death. Gallup News Service, *Americans' Views of Death Penalty More Positive This Year* (May 19, 2005). "Most Americans believe that executions of innocent people are rare - two in three believe this has happened in 5% or fewer cases in the last five years, including one-third who say it has not happened at all. Only 6% believe it has happened in more than 20% of the cases - less than half the percentage who said this in 2003 (13%). Although 95% of the public believed that innocent people are sometimes sentenced to death, 69% of the public supported the death penalty." Harris Interactive Poll 2, *More Than Two-Thirds of Americans Continue to Support the Death Penalty*, January 7, 2004.

506 U.S. 390, 427 (1993) (O'Connor, J., concurring); *Townsend v. Sain*, 372 U.S. 293, 317 (1963); *Fielder v. Varner*, 379 F.3d 113, 122 (3d Cir. 2004).

In *Herrera*, the petitioner pointed out the obvious - that Constitutional protections "sometimes fail." 506 U.S. at 420 (O'Connor, J. conc.). The late Chief Justice Rehnquist noted the scholarly debate surrounding studies of cases of "actual innocence" or "mistaken convictions." *Id.* at 415 n.15. Since *Herrera*, the debate about "actual innocence" has continued. See J. Marquis, *The Myth of Innocence*, 95 J. Crim. L. & Criminology 501 (2005). Both petitioner and his amici now posit a "dramatically changed legal and factual landscape resulting from innocence exonerations that have become increasingly frequent. . . ." ABA Br. at 19. They suggest that "public confidence" in the criminal justice system needs to be restored. Former Prosecutors [FP] Br. at 8. The amici states submit that petitioner and his supporters overstate the situation.[2/]

Amici curiae do not claim that an innocent person has never been convicted and sentenced to death. This Court already recognizes the potential for fallibility. *Herrera*, 506 U.S. at 415. There is always a risk of convicting the "actually innocent," since our criminal justice system requires proof of guilt "beyond a reasonable doubt," not to an "absolute certainty." *Franklin v. Lynaugh*, 487 U.S. 164, 188 (1988) (O'Connor, J. concurring). Rather, amici will provide perspective on the misleading methodology, temporal irrelevance, and exaggerated rhetoric behind current claims relating to Death Row "exonerations."

A. The DPIC List Of "Actually Innocent" Death Row Inmates

The principal source of skepticism relating to "mistaken convictions" is the Death Penalty Information Center's running

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2. Even petitioner's amici concede that exonerations remain "uncommon." ABA AC at 19 fn.24.

total of "exonerees" entitled "Innocence-List of those Released from Death Row" [hereafter DPIC List].[3/] Pet. for Writ of Cert. at 33 n.19; ABA Br. at 19 n.24; FP Br. at 6. Currently, the DPIC List contains 122 "exonerated" defendants. The DPIC recently relied on its list to proclaim a capital punishment "crisis." DPIC, *Innocence and the Crisis in the American Death Penalty* (Sept. 2004).

Although there are other studies and lists relating to innocence,[4/] it is appropriate to focus on the DPIC List because it is concerned exclusively with capital cases since 1970. Most (though by no means all) capital cases tried since 1970 have been subject to the various procedural protections mandated by this Court's post-*Gregg* Eighth Amendment jurisprudence, and the DPIC list is the most prominent and frequently cited of the lists of allegedly innocent people.

DPIC derives its List from court opinions, the media, and conversations with participants. Although the List was commissioned by the House Subcommittee on Civil and Constitutional Rights in 1993, it traces its origins to the studies referenced in *Herrera supra*, 506 U.S. at 415 fn. 15 (citing Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21 (1987) [hereafter Stanford] and Markman & Cassell, *Protecting the Innocent: A Response to the*

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3. The list is located at the DPIC website: http://www.deathpenalty.info.org. The List's history and its criteria are explained on the DPIC's website. The referenced DPIC publications are also located at this website.

4. For instance, petitioner and his amici also cite Samuel Gross, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523 (2004). This study relies substantially on the DPIC List although it does not agree with the DPIC List regarding all defendants. The study of reversal rates in capital cases conducted at Columbia University, of course, did not examine claims of "actual innocence." However, that study's own data confirms only a 7% innocence rate for cases retried after reversal. Liebman, Fagan, & West, *A Broken System: Error Rates in Capital Cases, 1973-1995* (June 12, 2000) at 6.

Bedau-Radelet Study, 41 Stan. L. Rev. 121 (1988). The Stanford study focused primarily on "wrong person" mistakes, cases in which the defendant was both legally and physically uninvolved. It excluded cases in which the defendant was acquitted on grounds of self-defense. The Stanford authors admitted that their study was not definitive and that their conclusions about innocence were based on their untested belief that a majority of neutral observers examining these cases would conclude the defendants named in their study were actually innocent. Stanford, *supra*, at 23-24, 45, 47-48, 74.[5/] The popular successor to the Stanford study is the book by the same authors entitled *In Spite of Innocence* (1992).

The most recent refinement of the Stanford study appears in Radelet, Lofquist & Bedau, *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. Cooley L. Rev. 907 (1996) [hereafter Cooley]. This article altered the criteria in the Stanford study. For instance, it included accomplices mistakenly convicted as actual perpetrators. More notably, Cooley "includ[ed] cases where juries have acquitted, or state appellate courts have vacated the convictions of defendants, because of doubts about their guilt (*even if we personally believe the evidence of innocence is relatively weak*)." Cooley, *supra*, at 914 (emphasis added). Regrettably, the Cooley article does not identify all of these "relatively weak" cases.

The DPIC List amalgamates the cases listed in these studies with other cases based on its own recently revised criteria:

> The definition of innocence that DPIC uses in placing defendants on the list is that they had been convicted and

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5. Ironically, the DPIC has now repudiated this "neutral observer" standard without acknowledging that it was originated by the Stanford study for cases now included on the DPIC List. See, *Innocence and the Crisis in the American Death Penalty, supra*.

> sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped; or b) they were given an absolute pardon by the governor based on new evidence of innocence.[6]

As will be shown below, these criteria do not accurately identify persons sentenced to death who are "actually innocent" of the underlying crime.

B. Shortcomings Of The Overly Inclusive DPIC List

"A prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime." *Sawyer,* 505 U.S. at 340); *Johnson v. Pinchak*, 392 F.3d 551, 564 (3d Cir. 2004). The DPIC List criteria quoted above have obvious shortcomings in terms of identifying the "actually innocent" because appellate reversals, acquittals on retrial, and prosecutorial dismissals are not conclusive evidence of innocence. Bedau & Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 Stan. L. Rev. 161, 162 (1988) [hereafter Stanford Reply]. The DPIC List is misleading for another reason: it includes defendants whose convictions were reversed due to legal insufficiency, not based on successful assertions to a judge or jury of actual innocence.

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6. Recently, due to this revision, the DPIC removed six defendants it had formerly classified as "exonerees," including Californians Jerry Bigelow and Patrick Croy. Both of these defendants had been listed on the DPIC List even though they were indisputably actual perpetrators or physically involved in the murders for which they had been sentenced to death. *Bigelow v. Superior Court (People)*, 208 Cal.App.3d 1127 (Cal.App. 1989); *People v. Croy*, 41 Cal.3d 1 (Cal. 1985).

1. Acquittals And Dismissals Do Not Mean "Actual Innocence"

When a jury acquits a defendant because the prosecution has not proven guilt beyond a reasonable doubt, that verdict does not mean that the defendant did not actually commit the crime, i.e., that the defendant is "actually innocent." *Dowling v. United States*, 493 U.S. 342, 249 (1990); *Graham v. City of Philadelphia*, 402 F.3d 139, 145 (3d Cir. 2005) ("[A]n acquittal (i.e., not guilty beyond a reasonable doubt) following a criminal trial is not ipso facto a finding of actual innocence"). Even an acquittal based on self defense represents no more than the jury's determination that there was a reasonable doubt about guilt, not that the defendant was "actually innocent." *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987); *Beavers v. Saffle*, 216 F.3d 918 (10th Cir. 2000).

Implicit in the "reasonable doubt" standard, of course, is that a conviction does not require "absolute certainty" as to guilt. Equally implicit, however, is that many guilty defendants will be acquitted, rather than convicted, because the proof does not eliminate all "reasonable doubt." *Smith v. Balkcom*, 660 F.2d 573, 580 (5th Cir. 1981). A jury must acquit "someone who is probably guilty but whose guilt is not established beyond a reasonable doubt." *Gregg*, 428 U.S. at 225 (White, J. concurring). "It is important to preserve the distinction between acquittal and innocence, which is regularly obfuscated in news media headlines. When acquittal is interpreted as a finding of innocence, the public is led to believe that a guiltless person has been prosecuted for political or corrupt reasons." Schwartz, *"Innocence"-A Dialogue with Professor Sundby*, 41 Hast. L.J. 153, 154-155 (1989), *cited in* Bedau & Radelet, *The Execution of the Innocent*, 1998 Law & Contemporary Problems 105, 106 fn. 9.

In addition,"[p]rosecutors sometimes fail to retry the defendant after a reversal not because of doubt about the accused's guilt, much less because of belief that the defendant is innocent or that the defendant is not guilty 'beyond a

reasonable doubt,' but for reasons wholly unrelated to guilt or innocence...." *Ibid.* at 106.

2. Current Procedures Protect The Innocent

The DPIC List does not account for the Constitution's "unparalleled protections against convicting the innocent . . . ." and our "unique" system of dual review. *Herrera,* 506 U.S. at 420; Louis Powell, *Capital Punishment*, 102 Harv. L. Rev. 1035, 1045 (1989). At times, when convictions are reversed and errors are corrected on retrial, defendants are either acquitted or receive a sentence less than death. These are cases in which the "conventional system of appellate review worked." Marshall, *Do Exonerations Prove "The System Works?"* 86 Judicature 83, 88 (2002) [hereafter Marshall]. While the DPIC List includes such cases, they hardly testify to a "crisis" in the criminal justice system.[7]

3. The DPIC List Includes Defendants Who Obtained Relief On Purely Legal Grounds—Not "Actual Innocence"

Moreover, the DPIC List strays outside its own criteria. The List includes cases in which convictions were reversed due to legal insufficiency, not because of actual innocence. "Actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614 (1998); *United States v. Ramos*, 147 F.3d 281, 286 (3d Cir. 1998). Of course, if an appeals court reverses a conviction because the evidence of guilt was legally insufficient to prove guilt beyond a reasonable doubt, then the state cannot retry the defendant under the the Double Jeopardy Clause. *Burks v. United States*, 437 U.S. 1, 16-18 (1978). The prosecution gets no second

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7. The arbitrary time frame used by the DPIC in compiling its list is also misleading in terms of assessing our present system of capital adjudication. The List begins with defendants who were convicted under death penalty statutes that predate current death penalty jurisprudence.

chance, even if there is better evidence of guilt available. However, that does not mean that the defendant who is released is the "prototypical" example of "actual innocence."

Despite its sympathies, the federal district court in *Quinones* agreed that the DPIC List was overly-inclusive. *Quinones I,* 205 F.Supp. at 265. After examining at least 101 descriptions of the cases on the DPIC List at that time, the court applied an undefined "conservative criterion" to conclude that only 31of the defendants named on the DPIC List were "factually innocent." The court also speculated that eight other defendants had substantial arguments of innocence. *Id.* at 265 & fn. 11.

Nonetheless, the DPIC List creates the false impression that all 122 of the named defendants were the "prototypical" wrong persons. This has led to hyperbolic rhetoric reflected in the briefing in this case. For instance, "for every innocent person left imprisoned, a guilty one remains at large. . . ." ABA Amicus at 10. "And of course the State wins, too, when exonerations permit it to prosecute and punish the true perpetrators of crime." FP Amicus at 11.[8] Of course, it is not

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8. In other forums, the DPIC List is continually misinterpreted as meaning that the "wrong person" was convicted in every case: "When dozens of innocent people are being sentenced to death, and dozens of guilty people are working [walking] free because the State has convicted the wrong person, we must ask ourselves what went wrong in that trial process. . . ." 146 Cong. Rec. S4669-03, S4675 (6/7/00) (statement of Sen. Leahy). Similarly, "[t]here is one other thing we should keep in mind. If the wrong person is on death row for a murder, if somebody is convicted of a murder they did not commit, that means that the real murderer is still running loose. Maybe everybody can feel comfortable that we have locked up somebody for the murder, but if there is still a killer on the loose, everything has broken down. Not only is an innocent man on death row, but a guilty man is running free." 148 Cong. Rec. S889-02, S891 (2/15/02) (statement of Sen. Leahy). As explained in the text, the fact that a defendant is acquitted or a case is dismissed does not necessarily mean that a "guilty person" is still "walking free" or "running loose." As recently as 2004, information from the DPIC List and similar studies was still relied upon fallaciously to assert: "What's more, the conviction of these innocent people inflicted needless

true that simply because a defendant was acquitted on retrial or a case was dismissed that he or she was the "wrong person" and there is some other guilty perpetrator still roaming around. Rather, it may frequently mean that the prosecution simply cannot prove the guilt of the "right person." The DPIC List inexplicably ignores that distinction.

C. Individual Examples of DPIC List Shortcomings

The DPIC claims its list is based on objective criteria and that its critics use subjective judgment. First, it is not true that the DPIC List is wholly objective. Its roots are found in a study that reached its conclusions on the authors' untested belief that a majority of neutral observers examining these cases would conclude the defendants were actually innocent. Stanford, *supra,* at 23-24, 47-48, 74.

Second, objective criteria do not help to address the principal concern – whether the state has convicted the "wrong person." A fundamental precept of death penalty law is that each case should be an "individualized inquiry" into the circumstances of the offense and the offender. *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987). Yet the DPIC List does not

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harm on the criminal justice system because every time an innocent person is convicted, that means the guilty person who committed the rape or the murder or the robbery has not been caught and is out committing other crimes." Prof. Samuel Gross, Univ. of Mich. Law School, NPR, 4/20/04, 2004 WL 56756464. Even in its most recent report, the DPIC cannot resist insinuating that its list demonstrates that the wrong person was convicted of the crime: "Besides the danger of establishing a class of individuals who are placed under permanent suspicion, the failure to acknowledge the innocence of those who have been exonerated retards the search for the real perpetrator." *Innocence & the Crisis in the American Death Penalty*, Pt. IV. Most recently, at the hearings on the confirmation of Judge John G. Roberts as Chief Justice of the United States, the 121 inmates then mentioned on the DPIC List were cited as "121 people who we know were sentenced to die for crimes they did not commit." Transcript, Senate Judiciary Committee Hearings on the President's Nomination of Judge John G. Roberts as Chief Justice of the United States, September 14, 2005 (remarks of Sen. Feingold).

honor this precept. Rather, it concludes that a defendant is "innocent" if he is not convicted in a retrial or the charges are dismissed by the prosecutor. These overinclusive, undiscriminating criteria are not supported by law or experience. They demonstrate that "a consistency produced by ignoring individual differences is a false consistency." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

Limitations of space preclude an in-depth critique of the DPIC List. However, it is sufficient to highlight examples of the cases the List cites to raise doubts about its overbroad methodology and questionable relevance. *Quinones I*, 205 F.Supp. at 265.[9]

1. The DPIC List Includes Defendant Who Are Not "Actually Innocent"

The most notorious example of a defendant on the DPIC List who is not "actually innocent" is **Jay C. Smith (48)**.[10] As a matter of Pennsylvania law, Smith escaped retrial for triple murder due to prosecutorial misconduct. However, when he sought damages for false imprisonment, the federal appeals court conclusively retorted, "Our confidence in Smith's convictions for the murder of Susan Reinert and her two children is not the least bit diminished . . . ." Yet Smith still remains on the DPIC List as an "exoneree." *Smith v. Holtz*, 210 F.3d 186 (3d Cir. 2000).

Smith's case is not unique. The prosecution did not retry **Jeremy Sheets (97)** because the Nebraska Supreme Court excluded key evidence. However, the Nebraska State Victims' Compensation Fund denied Sheets' request for compensation because the dismissal of his case was not based on innocence. Neb. Op. Att'y Gen. No. 01036, 2001 WL 1503144. The

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9. Amici utilize many of the same types of sources and information relied upon by the DPIC, including media accounts when necessary.

10. The parenthetical number refers to a defendant's numerical placement on the DPIC List as of November 16, 2005.

Eighth Circuit Court of Appeals dismissed Sheets' civil rights suit because there was no evidence that a witness who supplied incriminating evidence against Sheets was unreliable. *Sheets v. Butera*, 389 F.3d 772 (8th Cir. 2004).

Andrew Golden's (55) conviction was reversed because of legal insufficiency of the evidence, not "actual innocence": "The finger of suspicion points heavily at Golden. A reasonable juror could conclude that he more likely than not caused his wife's death." *Golden v. State*, 629 So.2d 109, 111 (Fla. 1993).

The appeals court reluctantly reversed **John C. Skelton's (42)** conviction. "Although the evidence against appellant leads to a strong suspicion or probability that appellant committed the capital offense, we cannot say that it excludes to a moral certainty every other reasonable hypothesis except appellant's guilt . . . Although this Court does not relish the thought of reversing the conviction in this heinous case and ordering an acquittal, because the evidence does not exclude every other reasonable hypothesis, we are compelled to do so." *Skelton v. State*, 795 S.W.2d 162, 168-69 (Tex.Crim.App. 1989).

Jimmy Lee Mathers (44) was released after his conviction was reversed by a sharply split Arizona Supreme Court for legal insufficiency of the evidence. The contrasting majority and dissenting opinions demonstrate that Mathers was not found "actually innocent." *State v. Mathers*, 796 P.2d 866 (Ariz. 1990).

The Florida Supreme Court explained that "evidence exists in this case to establish that **[Robert Hayes (71)]** committed this offense [rape-murder], physical evidence also exists to establish that someone other than Hayes committed the offense." *Hayes v. State*, 660 So.2d 257, 266 (Fla. 1995). The court excluded evidence of Hayes's semen on the victim's shirt. Despite the presence of Hayes's semen in the victim's vagina, other circumstantial evidence pointing at another perpetrator raised a reasonable doubt about Hayes. Fla. Comm'n on Capital Cases, *Case Histories: A Review of 24 Individuals Released from Death Row* (rev. 9/10/02) at 38-39 [hereafter Fla.

Comm'n].

Similarly, when the California Supreme Court vacated **Troy Lee Jones's (66)** murder conviction on grounds of ineffective assistance of counsel, the court noted that there was still evidence suggesting Jones's guilt even if that evidence was not overwhelming. *In re Jones*, 13 Cal.4th 552, 588 (1996). However, due to the passage of time, the prosecution no longer had the evidence and witnesses available to retry the case. Susan Herendeen, *Killer's Appeal Could Take Decades with Huge Backlog, Death Penalty Cases Creep Through System,* Modesto Bee, March 17, 2005, at A12.

Warren Douglas Manning (83) was tried five times. The first four trials ended as either mistrials or convictions which were reversed for instructional and venue error. *State v. Manning*, 409 S.E.2d 372 (S.C. 1991); *State v. Manning*, 495 S.E.2d 191 (S.C. 1997). Manning was acquitted after his fifth trial. However, the jury's verdict was not based on "actual innocence." Rather, as his lawyer conceded to the jury: "If there wasn't any case against Warren Manning, then we wouldn't be here. But the law requires that the state prove him guilty beyond a reasonable doubt. Without that, the law says you cannot find him guilty." Associated Press, *Man Found Innocent in Trooper's Death,* September 30, 1999.

A final example suffices to explain why the DPIC List's inclusion of these types of cases is problematic in failing to establish that the judicial system convicted the "wrong person." **Steven Smith's (79)** conviction was ultimately reversed for insufficiency of the evidence with this caveat: "While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. They find them guilty or not guilty. A not guilty verdict expresses no view as to a defendant's innocence. Rather, it indicates simply that the prosecution has failed to meet its burden of proof. . . . When the State cannot meet its burden of proof, the defendant must go free. This case happens to be a murder case carrying a sentence of death against a

defendant where the State has failed to meet its burden. It is no help to speculate that the defendant may have killed the victim." *People v. Smith*, 708 N.E.2d 365, 371 (Ill. 1999).

2. The DPIC List Includes Defendants Who Were The Actual Perpetrators or Principals

Contrary to the original Stanford Study, the DPIC List includes defendants who were involved in the murders they were charged with committing, even if they were not the actual perpetrators. **Richard Neal Jones (34)** was acquitted of murder, but remained implicated in the conspiracy leading to the murder. *See Jones v. State*, 738 P.2d 525 (Okla.Crim.App. 1987); *Mann v. State*, 749 P.2d 1151 (Okla.Crim.App. 1988); *Thompson v. Oklahoma*, 487 U.S. 815, 817, 859 (1988); *Thompson v. State*, 724 P.2d 780 (Okla.Crim.App. 1986) (separate trial of co-defendant with evidence directly implicating Jones). Similarly, the evidence was insufficient that **Ricardo Aldape Guerra (69)** was the actual triggerman in the murder of a police officer, but the evidence remained that he was an accomplice. *Guerra v. Johnson*, 90 F.3d 1075, 1076 (5th Cir. 1996). Since Guerra was not prosecuted under the "law of parties," he could not be retried. *Plata v. State*, 875 S.W.2d 344, 347 (Tex.Crim.App. 1994).

The DPIC List abandons the criteria of the Stanford Study and includes defendants who were not the "wrong persons," but were acquitted on grounds of justified or excusable homicide: **Michael Linder (18)** (self defense), Cooley, *supra*, at 948; **Robert Wallace (33)** (accidental shooting/self-defense).

3. The DPIC List Includes Defendants Who Benefitted From The Exclusion Of Evidence Of Their Guilt

Defendants who cannot be retried because they have benefitted from the "windfall" of suppressed evidence of their guilt are not "actually innocent." "[I]t has long been clear that exclusion of illegally seized but wholly reliable evidence

renders verdicts less fair and just, because it 'deflects the truthfinding process and often frees the guilty.'" *Kimmelman v. Morrison*, 477 U.S. 365, 391-98 (1986) (Powell, J. concurring); *In re Neely*, 6 Cal.4th 901, 922-25 (1993) (Arabian, J. concurring) (suppression of tape recording of defendant's admissions renders retrial "inherently less reliable"). Yet the DPIC List contains defendants whose cases were dismissed because evidence of their guilt was excluded on retrial.

When he was interrogated, **Jonathan Treadaway (13)** made a number of incriminating statements to police and failed to explain other incriminating evidence. The evidence of his statements was suppressed because of a technical violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). *State v. Corcoran*, 583 P.2d 229 (Ariz. 1978). Of course, the exclusion of a statement on *Miranda* grounds does not mean that the statements were involuntary or unreliable. *Dickerson v. United States*, 530 U.S. 428, 444 (2000). The exclusion of these statements precluded evidence of a "consciousness of guilt" by Treadaway that could have affected the jury's ultimate acquittal of him on retrial. Stanford Reply *supra*, at 164; *In Spite of Innocence*, at 349. The acquittal did not mean that Treadaway was "actually innocent."

The trial court excluded evidence of **Dale Johnston's (43)** guilt that was seized as the "fruit of the poisonous tree" of an unconstitutionally coercive interrogation. *State v. Johnston*, 580 N.E.2d 1162 (Ohio 1990). Subsequently, a state trial court rejected Johnston's request for compensation for wrongful imprisonment because his innocence was not established. *Conviction Reversed, But Money Denied*, Cleveland Plain Dealer, Aug. 11, 1993, at B3.

Benjamin Harris (70) made incriminating statements that he committed a contract killing to the police, which he then contradicted on the witness stand when he denied that the killing was contractual. The incriminating statements were then suppressed on the ground that Harris's attorney was ineffective for permitting Harris to talk to the police. *Harris v. Wood*, 64

F.3d 1432 (9th Cir. 1995). Harris was not retried. Maureen O'Hagan, *Exonerated but Never Set Free Is Benjamin Harris Mentally Ill or Sane,* Seattle Times, Mar. 31, 2003, at B1.

4. The DPIC List Includes Defendants Who Were Acquitted Based On Recantations That Are "Properly Viewed With Great Suspicion"

Recantations "are properly viewed with great suspicion." *Dobbert v. Wainwright*, 468 U.S. 1231, 1233 (1984) (Brennan, J. dissenting.); *see also Allen v. Woodford*, 395 F.3d 979, 994 (9th Cir. 2005) and cases cited therein. Notwithstanding the inherent unreliability of recantations, the DPIC List includes defendants who were acquitted or who had their cases dismissed because of recanted testimony and statements.

For instance, **Joseph Green Brown (27)** could not be retried because of the multiple recantations of the prosecution's witness. Fla. Comm'n at 18.[11/]

Oscar Lee Morris (93) was found ineligible for the death penalty due to insufficient evidence. *People v. Morris*, 46 Cal.3d 1 (Cal. 1988). Ultimately, he was released due to a "deathbed recantation" given by a prosecution witness under "suspicious circumstances." *People v. Oscar Lee Morris* (BH001152) (order of Los Angeles County Superior Court dated 1/21/00). After Morris's unsuccessful civil rights suit, the Los Angeles City Attorney referred to the recantation as "an under-the-cover recitation with nobody who can verify it one way or another." Wendy Russell, *L.B. Wins Suit over Ex-Inmate; Court, Jurors Quickly Decide that Officers didn't Violate Man's Civil Rights,* Long Beach Press-Telegram, Nov. 21, 2002, at A4.

When **Joaquin Martinez (96)** was returned for retrial, his ex-wife recanted the testimony she gave against him at the first

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11. In fact, Justice Brennan cited Brown's case for the proposition that recantations should be viewed with great suspicion. *Dobbert, supra,* citing *Brown v. State*, 381 So.2d 690 (1980).

trial. The taped statements that could have contradicted her recantation were excluded. *Martinez v. State*, 761 So.2d 1074 (Fla. 2000); Fla. Comm'n at 70-71.

5. The DPIC List Ignores Evidence From The Trials Of Co-Defendant's And Other Cases Inconsistent With Claims Of "Actual Innocence"

When co-defendants are tried separately, evidence admissible against a defendant in one trial may not be admissible in the other. In several cases, the evidence elicited in other trials casts doubts on the "actual innocence" of defendants listed on the DPIC List.

For instance, **James Robison's (53)** conviction was reversed due to evidentiary error and he was acquitted on retrial. However, evidence incriminating Robison was introduced at the separate trial of his alleged accomplice. *State v. Dunlap*, 930 P.2d 518, 535 (Ariz.App. 1996).

Muneer Deeb (54) was acquitted of a bungled murder for hire after his case was reversed for hearsay error. A previous witness also refused to testify. *Deeb v. Texas*, 815 S.W.2d 692 (Tex.Crim.App.1991); Barbara Kessler, *Fighting the System Ex-Inmate Acquitted of Waco Murders Embraced by Rights Advocates, But Skeptics Doubt Innocence,* Dallas Morning News, Nov. 4, 1993 at A1. However, evidence at the separate trial of Deeb's alleged co-conspirator still connected Deeb with the murder. *Spence v. Johnson*, 80 F.3d 989, 1004 fn. 12 (5th Cir. 1996).

6. The DPIC List Ignores Media Reports Inconsistent With "Actual Innocence"

"Defendants are acquitted for many reasons, the least likely being innocence. A defendant may be acquitted even though almost every member of the jury is satisfied of his guilt if even one juror harbors a lingering doubt." Schwartz, *supra*, at 154-155. Although the DPIC List cites media reports as sources for its information, it disregards statements by jurors inconsistent

with the conclusion that a defendant is "actually innocent." While such statements are not admissible as evidence, these contemporaneous post-verdict explanations illustrate the distinction between acquittal and "actual innocence."

The jurors who acquitted **Robert Charles Cruz (58)** explained their not guilty verdict as a matter of "reasonable doubt." "Jurors admitted that they had doubts as soon as they voted unanimously for acquittal, with some saying they walked into the courtroom with aching stomachs. Some said they were consoled by the thought that if Cruz was involved, he had spent nearly 15 years in prison." J.W. Brown, *Man Freed in 5th Murder Trial Served 14 Years, Faced Execution for Slayings,* Arizona Republic, June 2, 1995, at B1. Similarly, a juror in the **Alfred Rivera (84)** trial characterized the acquittal as only a matter of reasonable doubt. *Ex-Death Row Inmate Acquitted in Retrial*, Charlotte Observer, Nov. 24, 1999, at C5.

7. The DPIC List Includes Cases In Which The Conventional System Of Appellate Review Worked To The Defendant's Benefit

Cases in which convictions were reversed "in the normal course of appellate review" without the "fortuitous discovery of new evidence" should have no "legitimate role to play in attacks on the death penalty." Marshall, *supra*, at 84 (analyzing "exonerations" in Illinois). The DPIC List includes many cases in which defendants were acquitted on retrial after reversal on direct review or were released on grounds of insufficient evidence due to the idiosyncrasies of state law. These cases do not advance any arguments for the widening of federal court jurisdiction.

Annibal Jaramillo's (21) was released after his conviction was reversed for insufficient evidence because of Florida's peculiar state law which required circumstantial evidence to be inconsistent with any reasonable hypothesis of innocence. This standard is not required by the Constitution or utilized in other states. *Jaramillo v. State*, 417 So.2d 257 (Fla. 1982); *Fox v.*

State, 469 So.2d 800, 803 (Fla.App. 1985). Similarly, **Robert Cox's (38)** conviction was also reversed because of insufficient evidence. "Circumstances that create nothing more than a strong suspicion that the defendant committed the crime was not sufficient to support a conviction . . . Although state witnesses cast doubt on Cox's alibi, the state's evidence could have created only a suspicion, rather than proving beyond a reasonable doubt, that Cox, and only Cox, murdered the victim." *Cox v. State*, 555 So.2d 352 (Fla. 1989).

Delbert Tibbs (11) murdered the boyfriend of the woman he raped. On appeal, Tibbs benefitted from a now obsolete Florida rule that "carefully scrutinized" the testimony of the prosecutrix since she was the sole witness in the rape case "so as to avoid an unmerited conviction." *Tibbs v. State*, 337 So.2d 788, 791 (Fla. 1976). Thus, despite the evidence of Tibbs's guilt as stated in this Court's opinion in *Tibbs v. Florida*, 457 U.S. 31, 33-35 (1982), his conviction was reversed – an action that the Florida Supreme Court later regretted as "clearly improper." *Tibbs v. State*, 397 So.2d 1120, 1126 (Fla. 1981).

Juan Ramos (32) was acquitted after his conviction was reversed because of inadequate foundation for the admission of dog scent evidence. *Ramos v. State*, 496 So.2d 121 (Fla. 1986). **Sabrina Butler (61)** was acquitted after the state court reversed her conviction because the prosecutor improperly commented on her failure to testify at her trial for murdering her infant son. *Butler v. State*, 608 So.2d 314 (Miss. 1992). **Thomas Kimbell (101)** was acquitted after his case was reversed because the trial court did not permit him to impeach a witness with prior inconsistent statements. "[T]he reality is that we don't know for sure why the two Kimbell juries came to two different conclusions." Kurtis, *The Death Penalty on Trial* 195 (2004).

Carl Lawson's (67) case is an "example of the system working well." Marshall, *supra*, at 89. He was acquitted on retrial after his case was reversed because the trial court denied him funds for a shoeprint expert and because his attorney had a conflict of interest. *People v. Lawson*, 644 N.E.2d 1172 (Ill.

1994). **"Steven Manning [(85)]** is another case in which it appears that the system itself worked." Marshall, *supra*, at 88. Manning's case was reversed for evidentiary error and he was acquitted on retrial.

Wesley Quick's (109) multiple murder convictions were reversed because the trial court impeded the cross-examination of prosecution witnesses. . . . Quick had testified he had been on LSD and did not remember what happened during the murders. *Quick v. State*, 825 S.2d 246 (Ala.App. 2001). When Quick was retried, he changed his version of events and impeached the witnesses. His subsequent acquittal is another example of the state appellate system properly working. However, Quick's changing testimony does not support a conclusion that he was the prototypical "wrong person." Associated Press, *Once Convicted of Murder, Man Acquitted in New Trial*, Apr. 22, 2003.

8. The DPIC List Is Artificially Expanded To Include Irrelevant Cases Of Defendants Who Were Convicted Under Unconstitutional Death Penalty Statutes

The era of 1973-1976 was a watershed in death penalty jurisprudence. Death judgments that were imposed prior to that time or under statutes which limited consideration of mitigating evidence were unconstitutional. The defendants were convicted and sentenced to death without the benefit of recent innovations in capital proceedings. These innovations were described by the authors of *In Spite of Innocence* as follows: "Current capital punishment law already embodies several features that probably reduce the likelihood of executing the innocent. These include abolition of mandatory death penalties, bifurcation of the capital trial into two distinct phases (the first concerned solely with the guilt of the offender, and the second devoted to the issue of sentence), and the requirement of automatic appellate review of a capital conviction and sentence." *Id.* at 279.

Given this dramatic change in capital case jurisprudence,

the DPIC List's inclusion of cases involving defendants convicted under these obsolete, unconstitutional statutes is not helpful in assessing the adequacy of the present-day collateral review system. Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 Stan. L. Rev. 121, 147-152 (1988). Yet, the DPIC List still includes the following irrelevant cases: **David Keaton (1)** (pre-*Furman* Florida statute), **Samuel A. Poole (2)** (North Carolina mandatory statute),[12/] **Wilbur Lee (3)**, **Freddie Pitts (4)** (pre-*Furman* Florida statute), **James Creamer (5)** (pre-*Furman* Georgia statute), **Christopher Spicer (6)** (North Carolina mandatory statute), **Thomas Gladish (7)**, **Richard Greer (8)**, **Ronald Keine (9)**, **Clarence Smith (10)** (mandatory New Mexico statute), **Gary Beeman (14)** (Ohio's pre-*Lockett v. Ohio*, 438 U.S. 586 (1978) statute), **Johnny Ross (19)** (mandatory Louisiana statute), **Ernest (Shujaa) Graham (20)** (mandatory California statute), **Lawyer Johnson (22)** (pre-*Furman* Massachusetts statute), **James Richardson (40)** (pre-*Furman* Florida statute), **Peter Limone (94)** (pre-*Furman* Massachusetts standard), **Timothy Howard (111)**, **Gary Lamar Jones (112)** (pre-*Lockett* Ohio statute), and **Laurence Adams (117)** (pre-*Furman* Massachusetts statute).

The consequence of including these anachronisms is to artificially inflate the number of "actual innocent" defendants on the DPIC List in order to seek changes in current death penalty law. Since it is totally speculative whether these defendants would have been convicted and sentenced to death under today's rules, they are irrelevant to assessing the advisability of litigating freestanding claims of actual innocence in federal court or changing the rules of procedural default.

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12. Moreover, the evidence of Poole's actual innocence is "weak." Cooley, *supra*, at 917.

D. The DPIC List Does Not Support A Cognizable Freestanding Claim Of Actual Innocence Or Modification Of The Exceptions To The Procedural Default Rule

In the final analysis, the claims that the 122 Death Row defendants on the DPIC List have all been exonerated are based on overly inclusive criteria and irrelevant cases. These cases do not justify federal court intrusion into state criminal justice systems.

To compile its List, the DPIC relies on inexact standards, such as acquittals on retrial, dismissals by the prosecution, and reversals for legal insufficiency of evidence, to exonerate released death row inmates. However, there is a big difference between "reasonable doubt" and the kind of "wrong person mistake" that was the genesis of the original Stanford study. Moreover, the DPIC uses old cases in which the defendants did not receive the modern protections that "probably reduce the likelihood of executing the innocent." It ignores the fact that the criminal justice system includes a system of review which gives defendants repeated opportunities to test the fairness of their convictions.

On its own terms, the DPIC List claims "actual innocence" for only 1.6 per cent of the 7,529 death sentences imposed between 1973 and 2004. Bureau of Justice Statistics Bulletin, *Capital Punishment 2004*, App. Table 2.[13] The more conservative approach of the court in *Quinones I* only recognized "actual innocence" in one-half of one per cent of the 7,084 death sentences imposed between 1973 and 2001. Finally, based on the DPIC List descriptions, approximately 100 of the 122 cases on the DPIC List were acquittals, dismissals, or exonerations that occurred due to state judicial and executive

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13. The inclusion of the twenty irrelevant cases that predate current death penalty statutes impacts this calculation. Without those cases, the "actual innocence" cases on the DPIC List drops to only 1.4 per cent of the 7,529 death sentences since 1973.

actions, not federal court proceedings. And, it is worth emphasizing, no "actually innocent" person has been identified as having been executed.

In the end, this Court is left with the same situation it confronted in *Herrera*, neither this Court nor amici question the potential fallibility of our criminal justice system, even with its unique and unparalleled federal and state procedural protections. However, the evidence is no more compelling now than it was during *Herrera* to expand federal court habeas power to entertain freestanding claims of "actual innocence" when no Constitutional error has occurred or to lighten the burden on habeas applicants to overcome their procedural failures in state court.

OFFICE OF THE CLERK

(2)
No. 04-8990

In the Supreme Court of the United States

PAUL GREGORY HOUSE,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR FORMER PROSECUTORS AND PROFESSORS OF CRIMINAL JUSTICE AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[*]

Amici curiae are former prosecutors and professors of criminal justice who have a continuing interest in maintaining the legitimacy of the criminal justice system as a fair and effective means of punishing the guilty and freeing the innocent.[1] Fair administration of the death penalty is a critical test of any system of justice. Under the intense public scrutiny capital cases receive, the failure to produce a just result resounds far beyond the confines of a particular case. The role of prosecutors is weakened, and their credibility before juries, judges, and the public is diminished, if a just outcome is not evident where the public most demands it.

This is one such case. Petitioner has a powerful claim of actual innocence, supported by unusually convincing evidence, but has been unable to escape the sentence of death. Adoption of the Sixth Circuit's approach would have the inevitable result of undermining public confidence in our system of justice, by increasing the possibility of wrongful executions and wrongful incarceration. *Amici* accordingly submit this brief from the perspective of individuals with a strong interest in ensuring the reliability of the criminal justice system and who share a concern that the task of prosecutors will become more difficult if the public cannot be confident that the innocent can be exonerated. The *en banc* majority in this case, having applied an unduly restrictive approach to this Court's reasoned precedents regarding habeas

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[*] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court, pursuant to Sup. Ct. R. 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief.

[1] A list of *amici* is found in Appendix A.

corpus claims of actual innocence, threatens those important interests. The judgment should therefore be reversed.

ARGUMENT

I. Public Confidence In The Integrity Of The Death Penalty Depends Upon The Ability To Halt The Execution Of Inmates Who Present Persuasive Evidence of Actual Innocence

In recent years, DNA and other evidence has shown that a significant number of inmates sentenced to death were actually innocent. Those exonerations quite naturally have garnered significant publicity.[2] Prosecutors' credibility before juries and the public depends upon the existence of a full range of safety valves to free the innocent when errors have occurred. Accessible judicial remedies for colorable claims of actual innocence serve this vital purpose.

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[2] See, *e.g.*, Larry Fish, *Cleared Death-Row Inmate to Be Freed*, Phila. Inquirer, Jan. 14, 2004, at B1 (Nicholas James Yarri cleared after spending more than half his life on Pennsylvania's death row); John W. Gonzalez, *Death Row Inmate Cleared In '86 Fire*, Houston Chronicle, Oct. 6, 2004, at B1 (Ernest Ray Willis cleared after spending 17 years on Texas death row); J.M. Lawrence, *Free At Last; 30-Year Journey from Death Row to Home*, Boston Herald, May 21, 2004, at 3 (Laurence Adams freed after 1974 Massachusetts death sentence); Henry Weinstein, *DNA Tests Finally Clear Louisiana Man Of Murder*, L.A. Times, Aug. 10, 2004, at A12 (Ryan Matthews freed after spending more than five years on Louisiana death row); Joseph Neff, *Gell Found Not Guilty*, News & Observer, Feb. 19, 2004, at A1 (Alan Gell freed after 1998 North Carolina death sentence); Kimball Perry, *'85 Murder Conviction Dismissed*, Cincinnati Post, Mar. 1, 2005, at A8 (Derrick Jamison wins dismissal of charges for which he spent 17 years on Ohio's death row); cf. Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. Times, Feb. 1, 2000, at A1.

A. The Integrity Of The Criminal Justice System Is Judged By Its Fairness To The Innocent

"[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup* v. *Delo*, 513 U.S. 298, 325 (1995). That is because "the central purpose of any system of criminal justice" is not just "to convict the guilty," but to "free the innocent." *Herrera* v. *Collins*, 506 U.S. 390, 398 (1993). Accordingly, the government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935).

Within this scheme, prosecutors are entrusted with a "special role * * * in the search for truth in criminal trials." *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999). The prosecutor's role "transcends that of an adversary: [the prosecutor] 'is the representative not of an ordinary party to a controversy, but of a sovereignty.'" *United States* v. *Bagley*, 473 U.S. 667, 675 n.6 (1985) (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935). See also National District Attorneys Association, *National Prosecution Standards* 9 (2d ed. 1991) ("The primary responsibility of prosecution is to see that justice is accomplished."); American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* § 3-1.2(c) (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); *id.* § 3-1.2 cmt. ("it is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty").

Where, however, prosecutors fail for whatever reason to acquiesce in the face of a strong showing of 'actual innocence,' the courts can and must step in. As this Court has found, "a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional" and warrant habeas relief. *Herrera*, 506 U.S. at 417. Concern for execution of the innocent, com-

pounded by additional constitutional concern for the conduct of the trial, requires that the burden of proof for "gateway" claims be a reasonable one. There, "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks [it] should have" in the verdict. *Schlup*, 513 U.S. at 325 (internal citation omitted), and reflects "the relative importance attached to the ultimate decision." *Ibid.* Accordingly, the legal framework governing claims of actual innocence must recognize "[t]he paramount importance of avoiding the injustice of executing one who is actually innocent." *Ibid.*

B. Imposition Of The Death Penalty Merits A Higher Standard Of Reliability Than Other Punishments

The American people and their Constitution hold the death penalty to a higher standard of reliability than other punishment. As the Court has recognized,

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.) (footnote omitted); see also *Solem* v. *Helm*, 463 U.S. 277, 294 (1983) ("the death penalty is different from other punishments in kind rather than degree").

In light of the public's justified scrutiny of the application of the death penalty, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather

than caprice or emotion." *Gardner* v. *Florida*, 430 U.S. 349, 357-358 (1977).

C. Public Confidence In The Reliability Of The Justice System Has Been Shaken In The Decade Since *Herrera* and *Schlup*, In The Wake Of Revelations That Innocent Defendants Have Been Condemned To Death

Recent DNA evidence and other evidence raise the specter of "[t]he quintessential miscarriage of justice" in "the execution of a person who is entirely innocent." *Schlup*, 513 U.S. at 324-326 & n. 42. When *Herrera* and *Schlup* were decided, there was not widespread concern over the possibility of executing the innocent. The public and the courts maintained confidence in the application of the death penalty "in no small part because the Constitution offers unparalleled protections against convicting the innocent." *Herrera*, 506 U.S. at 420 (O'Connor, J., concurring).

Many believed that the advent of DNA testing would merely confirm the accuracy with which our system of justice catches and punishes the guilty. See William S. Sessions, *DNA Tests Can Free the Innocent. How Can We Ignore That?*, Wash. Post, Sept. 21, 2003, at B2 (former head of FBI describing the creation of the FBI's DNA testing lab, and calling on fellow prosecutors and legislators to assure meaningful access to DNA evidence that can prove innocence). The results proved otherwise. They demonstrated that DNA gathered at a crime often did not match the individuals identified for prosecution. See, *e.g.*, *id.* (finding approximately 25% of DNA tests excluded the prime suspect in the investigation as the perpetrator). As DNA testing spread, so did exonerations. See *id.* (noting 137 post-conviction DNA exonerations for all crimes as of 2003).[3] The number

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[3] See also Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523

of individuals who were at one time sentenced to death but later exonerated of the crimes charged has climbed to 121 since 1973. Death Penalty Information Center, *Innocence and Death*, *available at* http://www.deathpenaltyinfo.org/article. php?did= 412& scid= 6#inn-yr-rc.[4] And the total number of post-conviction DNA exonerations (both capital and non-capital) in the United States has now reached 162. See http://www.innocenceproject.org/case/index.php (summarizing and indexing each post-conviction DNA exoneration).

In one celebrated case, journalism students helped to discover evidence that eventually helped to free four men in Illinois, two of whom had been sentenced to death. John Carpenter, *Hard Work Helps Bring Justice to 4 Innocent Men*, Chi. Sun-Times, June 23, 1996, at 26. Through the seemingly obvious technique of interviewing available witnesses, the students spurred an investigation that led to DNA tests and eventual exoneration of the four men. *Id.* Remarkably, students from the same class played a pivotal role a few years later in the release of a man who had spent sixteen years on death row. John Jeter, *Students' Probe Ends 16*

(2005) (locating 340 individual exonerations from 1989 through 2003, almost all of which "are clustered in two crimes: rape and murder").

[4] Research on death penalty verdicts has further eroded confidence in their reliability. See, *e.g.*, James Liebman, Jeffrey Fagan & Valerie West, *A Broken System; Error Rates In Capital Cases*, 1973-1995 (2000) (finding 65% overall error rate in capital punishment system, and 82% of all capital judgments reversed on appeal were replaced on retrial with a sentence less than death or no sentence at all, and, among reversals, 7% resulted in acquittals); see also James Liebman, *Overproduction Of Death*, 100 Colum. L. Rev. 2030 (2000) (arguing that strong incentives exist at trial to impose the death penalty on those who do not deserve it under applicable state substantive law).